

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 23, 2007 Session

ROBERT J. SKILLEN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2004-B-1462 J. Randall Wyatt, Jr., Judge

No. M2006-02524-CCA-R3-PC - Filed March 6, 2008

The petitioner, Robert J. Skillen, appeals from the Davidson County Criminal Court's denial of his petition for post-conviction relief from his multiple convictions for rape of a child and sexual battery by an authority figure. He claims that the trial court erred in denying his claims that he was denied the effective assistance of counsel and that his guilty pleas were not knowing and voluntary. We disagree, and we affirm the trial court's denial of his petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

David A. Collins, Nashville, Tennessee, for the appellant, Robert J. Skillen.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Hugh Edward Garrett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner was charged with sixty counts of crimes related to sexual activity with minors, prostitution, providing pornography to a minor, and casual exchange to a minor. Thirteen of the charges were severed and proceeded to trial. After the first day of testimony, the petitioner decided to plead guilty and accepted a twenty-five-year offer from the state which disposed of all the charges, including those which had been severed. The petitioner entered guilty pleas to two counts of sexual battery by an authority figure, a Class C felony, for which he received for each count three years to serve as a Range I, standard offender, and four counts of rape of a child, a Class A felony, for which he received for each count twenty-five years to serve as a Child Rapist. The sentences were imposed concurrently, for an effective twenty-five years of day-for-day service.

The petitioner filed the present post-conviction action. Counsel was appointed, and the trial court conducted a hearing at which the petitioner and his trial counsel testified. The petitioner's complaints at the hearing relative to his trial counsel were that counsel did not adequately investigate and was poorly prepared for trial, did not cross-examine one of the victims about inconsistent prior testimony, did not challenge a juror who was a DHS employee, and did not advise him properly regarding the guilty pleas. The petitioner also claimed that his guilty pleas were not knowing and voluntary because he did not understand that he was receiving sentences for which no possibility of early release existed.

The petitioner testified that when the accusations against him first arose, he wanted to meet with the detective and confess to the things he had done. He said counsel advised him not to do that and assured him he would be acquitted at trial. He said he asked counsel to investigate the victims' behavior and to subpoena their computers. He said the victims were truant, had problems with teachers, and were sexually aggressive. He said that two of the victims viewed pornography on his computer and told him they had visited the same sites on their computer. He said counsel did not accept his telephone calls and did not return a call to his relative who had paid part of counsel's fee.

The petitioner testified that he became depressed while in jail and was given medication. He said that the medication made him sick, made his "head shift," and caused him to faint in the shower. He stopped taking the medication about a week before trial. He said that after discontinuing the medication, he experienced racing thoughts, feeling faint, and an increase in "that brain shift thing" for about two months. He said he told counsel about the medication he took in jail.

The petitioner testified that one of the jurors was a case manager or department manager of DHS and that he did not want this juror seated. He said this individual was black. He admitted he did not tell counsel he did not want this person on the jury. He said counsel brought another attorney to assist him as a jury consultant.

The petitioner testified that counsel requested that he be allowed to give his opening statement after the state's proof but that the trial court made counsel give his opening statement before the state's proof. He said counsel's statement was confusing and caused him to lose confidence.

The petitioner testified that one of the victims testified at the preliminary hearing that she was thirteen years old when she had sex with the petitioner. He said that at the trial, this victim testified that she was twelve the first time she had sex with him. He said that he wrote counsel a note to cross-examine the witness about this inconsistency but that counsel ignored him.

The petitioner testified that he and the victims were mutually responsible for the activity which occurred. He said he took responsibility for being the adult but that the most serious of the allegations, rape of a child, were untrue. He said he did not learn until trial what the difference the age of the victim made for purposes of distinguishing between rape of a child and statutory rape.

The petitioner testified that he spoke with the prosecutor before pleading guilty and admitted the things he had done. He said he circled the counts he admitted but was confused by renumbering of the counts of the indictment. He said he had been told the state was offering a twenty-year deal that later turned into a twenty-five-year deal. He said he believed he was facing a possible one-hundred-year sentence. He said counsel never explained to him that the prosecutor had included rape of a child charges in the plea agreement. He said the term "day for day" was used in explaining the plea to him but the term "one hundred percent" was not. He said he did not remember signing a written plea agreement. He said he thought he was being "heroic" by pleading guilty because one of the victims scheduled to be the next witness was crying by the door. He said this victim had lived with him and that he had been like a father to her. He said that he never understood the final terms of the plea agreement until they were announced by the district attorney and that he did not object because he had not been told he could object. He said he did not remember the judge explaining to him that he was pleading guilty to rape of a child.

Trial counsel testified that he was retained to represent the petitioner. He said that he met with the petitioner several times and that he reviewed discovery, which included videotaped interviews of the victims. He said he interviewed the victim who had lived with the petitioner and interviewed other witnesses he could find whose names had been given to him by the petitioner. He said that in one of his meetings with the petitioner, he provided the petitioner with copies of the statutes related to his charges and reviewed the elements of the charges. He said he did not recall whether they discussed the petitioner's desire that he obtain a computer from the victims. He said they had discussed computers relative to the child pornography charges. He said those charges had been severed and he did not want to bring that kind of information into the trial because it would be more helpful to the state than the defense. He said that the defendant wanted him to investigate the victims' mothers and that he was able to gain information about them from the videotaped interviews of the victims, at which the victims' mothers were present. He said it was his understanding the victims' mothers were prostitutes. He said he did not think that bringing the victims' terrible home lives into the trial was a good idea because it reinforced the state's theory that the defendant had preyed on abused and neglected children.

Trial counsel testified that he did not think it was necessary to use an investigator based upon the information he had. He said the petitioner did not admit to him that he had committed many of the offenses until what would have been the second day of trial.

Trial counsel testified that the petitioner advised him he was taking medication for depression. He said he discussed with the petitioner his mental state and capacity to stand trial. He said the petitioner said he thought he was competent.

Trial counsel testified that his best defense was to raise the questions regarding the ages of the victims at the time of the offense. He said the victims had credibility problems that he thought he might be able to exploit. He said that at the preliminary hearing, the prosecutor tried to elicit testimony that the victim was under the age of thirteen at the time of one of the offenses but that the victim remained steadfast in her testimony. He said that by trial, the victim had remembered more

and testified that she was twelve. He said that he did not want to appear to be “grasping at straws” by cross-examining her about her preliminary hearing testimony but that he did cross-examine her about her interview with a detective, which was not in accord with her trial testimony.

Trial counsel testified that the defendant wanted to pursue a “Lolita defense” that he had been unable to resist the aggressive victims. He said he did not think this was a viable strategy and told the petitioner this on several occasions.

Trial counsel testified that the defendant wanted black jurors because he thought they would be more sympathetic to his situation. He said there had been a brief discussion that a DHS worker might actually be more objective in viewing the evidence.

Trial counsel testified that he wanted to reserve his opening statement until the end of the state’s proof. He admitted the court asked him to give his opening statement before the state’s proof. He said the petitioner was urging him to ask the victims to describe his genitalia, which the petitioner believed was unusual. He said he thought that was “a spectacularly bad idea” and wanted the petitioner to hear the state’s proof before he gave his opening statement because he believed the petitioner might change his mind about presenting a defense based on the appearance of his genitalia.

Trial counsel testified that he communicated a twenty-year offer to the petitioner before trial. He said he remembered advising the petitioner that the sentence would involve one hundred percent service. He said the defendant decided to plead guilty on the second day of trial because he could not bear to have the victim to whom he had been a father figure testify about the things he had done to her. He said the defendant thought the right thing to do was to plead guilty. Counsel said he “begged” the defendant not to plead guilty. He said they thought the twenty-year offer might still be available but that at the petitioner’s age of fifty-seven, that was a life sentence. He said the petitioner was emotional but was able to discuss the matter intelligently. He said that he discussed a twenty-year plea with the state but that the state insisted on twenty-five years. He said that the petitioner wanted to talk to the prosecutor and that the petitioner did so against his advice. He said he went over the written plea agreement with the defendant and explained day-for-day service again.

The petitioner testified on rebuttal that contrary to trial counsel’s testimony, trial counsel had never interviewed the victim who had lived with the petitioner. He said trial counsel never talked to other witnesses. He said counsel never investigated the drug and prostitution records of the victims’ mothers.

The petitioner testified that he told trial counsel the truth about all of the details of the case from the beginning. He denied that he had ever wanted to pursue a defense that the “streetwise entrepreneurial teens made [him] . . . do anything.” He said he always admitted his responsibility. He said, however, the victims solicited him for money and directed what would occur.

The petitioner testified that after trial he was placed in a mental health pod in the Department of Correction. He said this corroborated his claim he was not competent at the time of his guilty plea.

The petitioner denied that counsel had conveyed a twenty-year offer to him before the trial. He said that he did not hear about this until the second day of trial, and that by this time, the offer was for twenty-five years.

The transcript of the petitioner's aborted trial and his guilty plea hearing were admitted as an exhibit at the hearing. The transcript of the plea hearing contains the court's admonition of rights to the petitioner, the recitation of the plea agreement, and the petitioner's acknowledgment of the rights he was waiving and his acceptance of the terms of the agreement.

I

First, we consider the petitioner's ineffective assistance of counsel claim. The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In the present case, the petitioner argues that trial counsel was deficient because he failed to interview witnesses, left the DHS employee on the jury, and failed to cross-examine the victim who testified with her prior inconsistent testimony. The trial court made detailed findings on each claim. On the claim of failure to interview witnesses, the court found that counsel reviewed discovery and developed trial strategy from the police department's interviews of the victims and their parents. The court found that trial counsel interviewed several individuals as requested by the petitioner. With respect to the claim about the DHS employee, the court found that counsel discussed the advantages and disadvantages of this prospective juror with the petitioner. The court found that the petitioner believed that the juror, a black male, might be more sympathetic to the petitioner because of his race. The court found that counsel made a strategic decision to leave the juror on the panel. On the claim regarding cross-examination of the victim who testified, the court found that counsel made a strategic decision not to cross-examine the victim about her prior inconsistent testimony about her age at the time of one of the offenses. The court found that counsel's strategy was to avoid giving the victim the opportunity to say she had been mistaken in the earlier testimony, which he believed would be accepted by the jury and would damage the defense. Based upon these findings, the court held that the petitioner had failed to carry his burden of proof and denied his claim of ineffective assistance of counsel.

Upon appellate view, the evidence does not preponderate against the trial court's findings, and those findings support the trial court's legal conclusion that the petitioner failed to demonstrate ineffective assistance of counsel. The petitioner is not entitled to relief on this basis.

II

Second we consider the petitioner's claim that his guilty pleas were not entered knowingly and voluntarily. When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the petitioner." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." Id.

The petitioner claims that counsel's ineffectiveness and his lack of medication for depression resulted in guilty pleas that were not knowing and voluntary. The trial court rejected all of the petitioner's ineffective assistance of counsel claims and found that the petitioner was fully advised in the guilty plea petition and at the guilty plea hearing of his rights, the charges, and the sentences. The court also found that trial counsel explained the petitioner's rights, the proceedings, the plea agreement, and the sentences to him, that the petitioner understood the proceeding, and that the petitioner's decision to enter guilty pleas was knowing, voluntary, and intelligent. The undisputed evidence is that the petitioner wanted to resolve the case by pleading guilty, rather than continuing with the trial. The transcript of the plea hearing reflects that the petitioner voiced his understanding of his pleas and expressed his desire to go forward. The transcript reflects that the court reviewed the petitioner's rights, pleas, and sentences before accepting the pleas.

We conclude that the petitioner has failed to demonstrate that the evidence preponderates against the trial court's factual findings with respect to his knowing and voluntary entry of guilty pleas. We likewise conclude that the trial court's factual findings support its conclusion that the petitioner was not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE